ANOTHER WORD ABOUT THE EVOLUTION OF THE FEDERAL REGULATION OF INTRASTATE RATES AND THE SHREVEPORT RATE CASES

MR. COLEMAN'S studious and painstaking article[1] in the November, 1914, number of the REVIEW on the "Evolution of Federal Regulation of Intrastate Rates: The Shreveport Rate Cases," and his criticism of the Supreme Court's decision in that case[2] and in the Minnesota Rate Cases,[3] naturally impel us to a reconsideration of the theory upon which our system of precedent is based. His criticism of the court's decisions in these two cases is based, not upon any inherent unsoundness or want of expediency, as I understand it, but, rather, upon the alleged departure from the rules the court had laid down in prior cases on this subject; and Mr. Coleman complains of the judicial legislation or "judicial amendment" of the Constitution which such departure involves. He finds this departure by assuming that the definition of the "regulation" of interstate and intrastate commerce, and of such "commerce" itself, was and is the same thing, inherently and in legal contemplation, at all times,— when *Gibbons* v. *Ogden*[4] was decided and at the date of these last pronouncements of the court on the subject. It is this rigidity of definition and lack of adaptability to changing or changed conditions which have brought so much criticism on the legal profession, from even the most intelligent layman; and the question to which I want to direct attention is whether such criticism is not sound and whether the Supreme Court is not demonstrating the greatest wisdom in adopting changed definitions not only in respect of the "commerce" clause, but also as to many other legal subjects which changed economic and social conditions seem to require.

Mr. Coleman's criticism of the two decisions under consideration comes, in the last analysis, to this: The court has held consistently that purely intrastate or local matters are under the state's control, as distinguished from that of the federal government; intrastate

[1] 28 HARV. L. REV. 34.
[2] 234 U. S. 432 (1914).
[3] 230 U. S. 352 (1913).
[4] 9 Wheat. (U. S.) 1 (1824).

commerce is, *physically* and *abstractly*, severable from interstate commerce and has been held to be so by the Supreme Court; therefore the federal government should not now be held to have the power to regulate or control intrastate commerce in any way by virtue of the power to regulate commerce betwixt the states. It is immediately discernible where the difficulty lies in this proposition: it lies in the fact that the minor proposition is irrelevant. The question that presses is, not whether interstate and intrastate commerce are capable of *abstract* or *physical* separation or have been held to be so at some past time, but, rather, whether, with the development of modern economic complexity and interdependence, the two have not actually come to such interrelation that the power to regulate the one necessarily involves and implies, if not an absolute power to regulate the other, yet an incidental power to affect it seriously. If this question is answered in the affirmative, the decisions of the Supreme Court will be found entirely consistent. From the time of the earliest decisions the court has held that the federal government has the power to regulate interstate commerce, even though such regulation involved an incidental control of or effect upon some matter of purely local concern. Initially there was no such intimate relation betwixt interstate and intrastate commerce as made them inseparable in certain aspects. Accordingly it was held that Congress could not regulate or affect intrastate commerce under the guise of regulating interstate commerce. But in time the *fact* changed: state and interstate commerce became wellnigh inextricably intertwined, and with the change of *fact* the decision of the court changed, as it necessarily had to do to preserve the *principles* underlying the whole chain of decisions, *i. e.*, the supremacy of the federal control of interstate commerce. In a word, then, my text is the desirability of adherence to the big principle underlying precedent decisions, rather than to the letter of such decisions. Changes of economic or social conditions often make this slavish adherence to the letter of the prior decision the widest departure from the principle which underlay the earlier cases. Perhaps the greatest glory of our common-law system of precedent has been that the stress laid on principles, rather than on the letter, of the earlier decisions has tended to give us a set of flexible rules which can be made to fit our advancing civilization without the disturbance incident to the formal abro-

gation of the old laws and the adoption of new ones, such as we find in the case of written statutes.

The objection may be urged, that in the subject under discussion we are dealing with a written constitution and that, consequently, there is no proper place for the application of the flexibility we admire in the common law and which, I believe, the Supreme Court is rightly applying in these commerce-clause decisions. Indeed Mr. Coleman specifically urges this when he complains of "judicial amendment." But, I submit, there is quite as much place for this laudable adaptability in the case of the definition and application of a big, sweeping phrase, like this "regulation of commerce among the states" in our fundamental law, as in the general adjustment and settlement of private rights by the courts where there is no written rule or statute. In each case the *desideratum* is a consistent continuity of principle. To be sure, in each of the two classes of cases the reasons for desiring this consistency or continuity may be different, and, I have no doubt, are so; but this divergence does not change the community of aim. In the ordinary common-law cases, the object is to get a workable rule which people can reasonably know in advance and to which they can make their conduct conform, without hindrance to the normal development of a growing and advancing civilization. In the case of the construction of the constitutional provision, the object the court must hold before its eyes continually is the fulfillment of the idea of the Constitution makers, even though the literal application has been rendered impossible by changing or altered conditions. And, it seems to me clear, it is the duty of the court to see to it that this big purpose is carried out, rather than to aid in the defeat of such purpose by the application of some prior decision really based on different facts.

There can be no doubt that our Constitution makers,— or some of them at least, — foresaw the tremendous and far-reaching import of this commerce clause, even though they could not anticipate all the details of the development of interstate commerce. That great statesman, Alexander Hamilton, in drafting the address to the states of the Annapolis convention in 1786, says:[5]

"They [the Commissioners] have been induced to think that the power of regulating trade is of such comprehensive extent, and will enter

[5] Alexander Hamilton's Works (Senator H. C. Lodge's 2d Fed. ed., 1904), p. 337.

so far into the general system of the federal government, that to give it efficacy, and to obviate questions and doubts concerning its precise nature and limits, may require a correspondent adjustment of other parts of the federal system."

In other words, even at that early date and before the Constitution had been even framed or formulated, Hamilton and his fellow-commissioners understood that the scope and extent of the power to regulate interstate commerce was very broad. It seems also a fair inference that Hamilton and his co-commissioners had some glimmering at least of the possibilities of development of interstate commerce. I do not mean that they could foresee the time when the artificial barrier of the state lines should practically cease for the purposes of trade, but it is clear that they had in mind the tremendous development of interstate commerce; and there can be no doubt that they intended to vest in the federal government the most absolute control of interstate commerce, no matter how broad and extensive such development might prove to be.

Now, consider for a moment the change of fact with reference to this commerce to which I have alluded. At the time of the adoption of the Constitution the bulk of the trade which existed in the United States was unquestionably intrastate. There had been no general development of the means of transportation whereby a general and complete interstate commerce was possible. Transportation could be conducted only by means of stage coaches and boats, and these means of transit were so slow and inadequate that any general commerce betwixt the residents of one state and those of another was very limited. In this condition of affairs it was no difficult matter for the federal government to regulate interstate commerce without touching the entirely distinct and disassociated trade existing within the different states, and, conversely, the states could regulate intrastate commerce without affecting interstate commerce to any appreciable extent. With the introduction of railroads, however, the situation changed. It became as easy for a man in the distant West to buy his merchandise in New York or Boston as it had been in the early days for the merchant in the interior of the state of New York or of Massachusetts. And with the development of the railroads the time has come when their entire system of transportation, both of freight and passengers,

largely consists of interstate commerce and is laid out and planned on that basis. With such a preponderance of interstate business it is self-evident that any extensive effort on the part of the different states which the railroad traverses, to lay down rules and regulations, though in terms purporting to regulate only the intrastate business, necessarily and vitally affects the larger interstate business which the road is doing. With this fact, and the further indubitable fact that the Constitution makers intended Congress and the federal government to have absolute and entire control of interstate commerce, it seems clear that the power of the federal government under the commerce clause must go so far as to give the federal government power, if necessary and advisable, to prohibit such conflicting regulation on the part of the states.

The decisions of the Supreme Court in the Shreveport Rate Case and the Minnesota Rate Cases, thus, involve nothing more than a recognition by the court of the changed conditions and facts in respect of the character of the commerce of the country and the consequent necessity for a change in ruling as to the scope of the power to regulate commerce between the states. In other words, these decisions represent a real adherence to the principle of the supremacy of the power of the federal government over interstate commerce, which principle, I believe, has been laid down practically from the outset.

I think an examination of the decisions of the Supreme Court involving construction of the other various sections and clauses of the Constitution in respect of the police power, due process, taxation, and the like, discloses the same sound tendency to go behind the letter to the spirit and to make the line of precedent one of principle rather than of details. This tendency, I am sure, we must all approve, and laud in this "hour of trial" of our profession and system.

John S. Sheppard, Jr.

NEW YORK CITY.